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The report reaches two conclusions: First, neither the laws and regulations applicable to (a) the American SECID university consortium's establishment and operation of an educational institution in Indonesia or, in the alternative, distance learning facilities in the United States offered to Indonesians residing within the Republic; or (b) the consortium's recruitment of Indonesian students to study at its member universities in the United States were disproportionate to their development objectives. From its experience establishing and operating education related businesses in other developing nations; i.e., Haiti, Senegal, Vietnam and the People's Republic of China, the consortium did not feel Indonesia's legal and regulatory requirements, although modestly discriminatory against foreign entities, were overly burdensome. Moreover, the consortium was free to compete for technical assistance-related projects financed by multilateral agencies such as the World Bank and ADB. Second, constraints encountered by foreign providers of educational services that did affect the viability of their businesses did not stem from the formal legal system (the laws and regulations above), but rather the manner in which the formal legal system was implemented in practice.

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Table of Contents

EXECUTIVE SUMMARY	3
1 Introduction	1
2 Background.....	1
3 Market for Educational Services	1
4 Legal and Regulatory Framework.....	2
4.1 Foreign Investment Laws and Regulations.....	2
4.2 Government Education Regulations	3
4.2.1 Government Regulation No. 60 of Year 1999.....	3
4.2.2 Lower-Ranking Implementing Regulations	5
5 Application of the Legal Framework to SECID's Objectives	5
6 Multilateral Agency-Financed Technical Assistance Projects	7
7 Impact of Decentralization and Good Governance	8
8 Supplemental Business Initiatives	9
9 Non-Legal Implementation Constraints.....	9
10 CONCLUSION.....	10
11 Persons Interviewed for this Assignment.....	11
12 Education Projects Approved for Implementation	14
13 Hierarchy of Indonesian Laws and Regulations.....	16
14 Implications on Project Implementation	17

EXECUTIVE SUMMARY¹

This report provides an analysis of the legal and regulatory framework governing foreign providers of educational services in Indonesia, and is presented as a case study of the business development experience of a consortium of United States-based universities operating in the Republic of Indonesia during the period February 2000 through February 2002.

The legal and regulatory framework applicable to the consortium was broadly summarized into four categories; namely, laws and regulations that govern:

1. Foreign Investment: Law No. 1 of Year 1967 and implementing regulations promulgated by the Investment Coordinating Board (BKPM);
2. Education Services Businesses: Government Regulation No. 60 of Year 1999 and five regulations adopted to implement Law No. 2 of Year 1989 Regarding the National Education System;
3. Operations at the Autonomous Regional Governments: Laws No. 22 of Year 1999 on Regional Government Administration, Law No. 25 of Year 1999 on the Fiscal Balance between the Central and Regional Governments; and the
4. Acquisition of Public Goods and Services: Presidential Decrees No. 16 of Year 1994, No. 17 of Year 2000 and No. 18 of Year 2000, with reference to the superceding provisions of the loan agreement.

The report reaches two conclusions:

First, neither the laws and regulations applicable to (a) the consortium's establishment and operation of an educational institution in Indonesia or, in the alternative, distance learning facilities in the United States offered to Indonesians residing within the Republic; or (b) the consortium's recruitment of Indonesian students to study at its member universities in the United States were disproportionate to their development objectives. From its experience establishing and operating education related businesses in other developing nations; i.e., Haiti, Senegal, Vietnam and the People's Republic of China, the consortium did not feel Indonesia's legal and regulatory requirements, although modestly discriminatory against foreign entities, were overly burdensome. Moreover, the consortium was free to compete for technical assistance-related projects financed by multilateral agencies such as the World Bank and ADB.

Second, constraints encountered by foreign providers of educational services that did affect the viability of their businesses did not stem from the formal legal system (the laws and regulations above), but rather the manner in which the formal legal system was implemented in practice.

¹ This report was prepared under the auspices of the Partnership for Economic Growth (PEG), a USAID-funded Project with the Government of Indonesia. The views expressed in this report are those of the author and not necessarily those of USAID, the U.S. Government or the Government of Indonesia.

The report's conclusions were based on data provided by the American consortium, corroborated through interviews conducted with representatives of British and Australian education providers, senior Ministry of National Education officials, and private Indonesian consultants familiar with the education sector.

The report provides a summary of the consortium's assessment of the market for educational services in Indonesia and constraints it might expect to encounter trying to penetrate the market.

The consortium first considered establishing either an Indonesia-based education institution in the regions or a distance learning facility in accordance with the provisions of Government Regulation No. 60 of Year 1999 regarding "Higher Education." The consortium's preliminary feasibility study did not support the economic viability of either alternative for the foreseeable future, particularly given the level of poverty in those regions where the services were most needed.

Instead, the consortium decided to limit its economic exposure and open a Representative Office to compete, in accordance with the framework governing the acquisition of public goods and services, for more than \$600 million of multilateral agency-financed education projects being carried out by newly autonomous district governments in Java, Sumatera and Sulawesi.

Over a two-year period of time (February 2000 through February 2002), the consortium found, to its chagrin, that the district governments either did not have the capability or the commitment (or both) to carryout multilateral agency financed Basic Education projects in accordance with stated education policies and the supporting legal and regulatory framework. Contracts for institutional development, project management, financial management and teacher training not only have not yet been awarded, but the regional based Ministry of National Education (MONE) offices have not yet prepared a short list of those bidders that will be permitted to compete for the projects. The financing agency, the World Bank, recently completed a restructuring of the Project to facilitate its implementation, and is actively pursuing allegations MONE officials have made illegal requests to include firms on the shortlist.

The difficulties the central government has experienced implementing and institutionalizing important development projects, such as the identified education projects, appear to have been "decentralized" to the district governments, and indications of corruption are not being vigorously pursued nor prosecuted, such that the local governments are neither responsive nor accountable to their citizens.

The consortium reached the conclusion that its experiences competing for multilateral agency-financed education projects were likely representative of the difficulties it would have encountered if it had established either an Indonesia-based education institution in the regions or a distance learning facility; that is, the stated development objectives in Government Regulation No. 60 of Year 1999 would not have been implemented in practice by local government officials who were either not capable of successfully interfacing with the consortium to comply with the nominal regulatory requirements or, more ominous, pursuing their self interests through repetitious request for illegal levies that, cumulatively, affect the economic viability of the consortium's efforts.

1 Introduction

This report provides an analysis of the legal and regulatory framework governing foreign providers of educational services in Indonesia, and is presented as a case study² of the business development experience of a consortium of universities operating in the Republic of Indonesia during the period February 2000 through February 2002.

2 Background

Of the many dramatic political, social and economic events that occurred in Indonesia during the eighteen month period May 1998 through November 1999, none was of more interest to the South East Consortium for International Development (SECID) than Indonesia's adoption of a government regulation to further develop a more cohesive, well functioning educational system in accordance with the principles of four decentralization and good governance laws enacted in 1999.

SECID, a Washington, D.C.-based non-profit consortium of twenty universities, believed that the new laws and regulations had the potential to bring dramatic changes to Indonesia and might help to ameliorate a number of difficulties the consortium experienced ten years earlier implementing the University of Sriwijaya Development Project, an Asian Development Bank (ADB)-financed project carried out in Sumatera, Indonesia.

The difficulties SECID experienced carrying out the Sriwijaya Development Project dissuaded it from competing for similar Indonesian education projects.

Now, in 1999, with Indonesia continuing its reform movement, SECID decided to re-evaluate the prospects of "doing business in Indonesia," and set about the task of assessing the market for educational services and constraints it might expect to encounter trying to penetrate the market.

3 Market for Educational Services

SECID's member universities were interested to establish an educational institution in Indonesia, the world's fourth most populous nation, or if this was not practicable, to consider ways to offer distance learning courses -- through the internet and/or satellite transmissions -- from its member universities to help young Indonesians, particularly those in more underdeveloped regions, to obtain a quality education. SECID's universities were also interested to encourage Indonesian students to study at their campuses in the United States, particularly as Indonesian business and law schools, among other education disciplines, were not generally recognized in the top higher education institutions within Asia.

SECID also perceived a market for highly specialized technical assistance to help the Ministry of National Education (MONE), which was considering the need to review and improve the teaching curriculum, enhance and expand teacher training and further

² The individuals interviewed to develop the case study are provided in Annex A.

develop the education sector. One of Indonesia's more obvious education needs was in basic education, with compulsory basic education having been increased from the sixth to the ninth grade. Indonesia's principal multilateral financing agencies, the World Bank and the ADB, were considering whether to finance more than \$600 million of education sector projects³, including:

- \$150 million for Basic Education Projects to be carried out in Bengkulu, Sulawesi, West Java and Riau (approved by the World Bank for implementation starting in calendar year 1999);
- \$180 million for Technological and Professional Skills Development (approved by the ADB in November 2000);
- \$100 million Decentralized Basic Education Projects (approved by the ADB in January 2001);
- \$150 million for Basic Education Projects to be carried out in areas other than Bengkulu, Sulawesi, Eastern Indonesia and West Java (approved by the World Bank in July 2001); and
- up to ten million dollars of technical assistance grants for Education Sector Policy Reform (various approval dates).

In summary, SECID determined the Indonesian education “market” was significant and identified four principal approaches to market its educational services:

- A. establish and operate an educational institution in Indonesia;
- B. operate distance learning facilities in the United States which would offer educational services to Indonesians residing within the Republic;
- C. encourage and facilitate Indonesian students to study at member universities in the United States; and
- D. compete for technical assistance-related projects financed by multilateral agencies such as the World Bank and ADB.

4 Legal and Regulatory Framework

4.1 Foreign Investment Laws and Regulations

From its work ten years earlier, SECID was familiar with the basics of “doing business” in Indonesia. As an entity organized outside of the Republic of Indonesia (a “foreign” entity), SECID was free to compete for multilateral agency financed contracts, the fourth marketing approach, but was not permitted to engage in a wide variety of business activities unless and until it complied with a number of legal requirements commonly found in many developing countries.

³ Annex B provides a summary of the major multilateral agency-financed projects.

To pursue the first three marketing approaches⁴, SECID would be required to comply with the provisions of Law No. 1 of Year 1967 and regulations promulgated by the Investment Coordinating Board (BKPM), to either form an Indonesian limited liability company under Law No. 1 of Year 1995 or establish a joint venture with an Indonesian entity (such as the State Administration Agency, *Lembaga Administrasi Negara* or LAN).

From its experience opening offices in many developing nations; including Haiti, Senegal, Vietnam and the People's Republic of China, SECID did not feel these investment regulatory requirements, although modestly discriminatory against foreign entities, were overly burdensome.

4.2 Government Education Regulations

4.2.1 Government Regulation No. 60 of Year 1999

SECID then evaluated Indonesia's newly-adopted education regulation, Government Regulation No. 60 of Year 1999 in the context of Indonesia's newly-enacted decentralization and good governance laws; i.e., Laws No. 22 of Year 1999 on Regional Government Administration, Law No. 25 of Year 1999 on the Fiscal Balance between the Central and Regional Governments, Law No. 28 of Year 1999 on "State Administrators Clean and Free From Corruption, Collusion and Nepotism," and Anticorruption Law No. 31 of Year 1999.

On 24 June 1999, the President signed Government Regulation (*Peraturan Pemerintah or the "Regulation"*) No. 60 of Year 1999 regarding "Higher Education"⁵ to govern the provision of educational services beyond high school (SMA), with a stated purpose to "more fully prepare Indonesian students to become productive members of society and to enrich the national culture."

The Regulation was adopted to implement Law No. 2 of Year 1989 Regarding the National Education System, and built upon five previously adopted regulations:

- *Peraturan Pemerintah Republik Indonesia Nomor 27 Tahun 1990 Tentang Pendidikan Prasekolah* (Government Regulation No. 27 of 1990 Concerning Pre-School Education);
- *Peraturan Pemerintah Republik Indonesia Nomor 28 Tahun 1990 Tentang Pendidikan Dasar* (Government Regulation No. 28 of 1990 Concerning Basic Education);
- *Peraturan Pemerintah Republik Indonesia Nomor 56 Tahun 1998 Tentang Perubahan Atas Peraturan Pemerintah Nomor 29 Tahun 1990 Tentang Pendidikan Menengah* (Government Regulation No. 56 of 1998

⁴ If SECID only wished to establish a presence to represent the interests of its member universities in sales promotion, without entering into contracts from the marketing its services to the general public, it could simply establish a "Representative Office" (which it ultimately chose to do in September 2001).

⁵ An unofficial English language translation was provided to the Consultant with the TOR.

Concerning The Revisions on the Government Regulation No. 29 of 1990 Concerning Secondary Education); and

- *Peraturan Pemerintah Republik Indonesia Nomor 73 Tahun 1991 Tentang Pendidikan Luar Negeri* (Government Regulation No. 73 of 1991 Concerning Overseas Education).

The Regulation delegates to MONE the responsibility for developing education policy and curriculum (Article 1), with, under Law No. 22/99, the implementation of those projects assigned to the MONE departments within each newly autonomous district (SECID's evaluation of the districts' implementation potential is provided in Annex D.)

The Regulation permits (Article 7) the language of instruction to be a foreign language, such as English, provided the foreign language is necessary to effectively deliver the knowledge, training, or skill, such as an expert foreign educator who does not speak Bahasa Indonesia.

The scope of the Regulation includes academic education (defined as graduate and post graduate education) and professional education (defined as four "diploma" programs), conducted either as classroom education in Indonesia or distance learning (Article 5) from providers based outside Indonesia. The establishment of distance learning education facilities is subject to the approval of the Minister, stated in Articles 57 and, duplicatively, Article 120.

Foreign citizens may (Article 11 subject to the limitations under Article 108) enroll as students to attend Indonesian higher education institutions and Indonesian citizens may (Article 23) attend and use the academic titles conferred by foreign institutions.

Chapter VIII of the Regulation governs the structures of higher education institutions, without discriminating against foreign educational entities, provided they comply with the Regulation's administrative requirements detailed in Part Two, Articles 35 through 57.

Of particular interest to SECID, to establish an institution of higher learning, it would be required to first submit and receive the approval of the Minister for MONE (Article 118). The institution would then be required to be administered by a "foundation"⁶ or a "social body" (Article 119).

Chapter XV of the Regulation provides that Indonesian higher education institutions may build "networking" relationships with other institutions, including foreign institutions (Article 129). In the context of the Regulation, networking may include management and technical assistance arrangements, exchange programs ("twining"⁷), credit transfer programs and other similar arrangements.

⁶ As a not-for-profit entity organized under US law, SECID would be required to form a similar not-for-profit entity under Indonesian law, a requirement that would not violate its Articles of Incorporation.

⁷ Most translations of the Bahasa Indonesia term in the official regulation refer to exchange program arrangements.

(ii) Previously Adopted Regulations

Government Regulation No. 73 of Year 1991 Regarding “Education Outside the School System” was adopted to implement Law No. 2 of Year 1989, and permits (Article 23) a course of study for Indonesians residing abroad which provides them with certain knowledge, skills and mental attitude to improve quality and standard of living offered outside the Indonesian School system through an institution or non-institution. Similarly, it permits (Article 24) foreign citizens residing in Indonesia the opportunity to participate in a course of study compatible with their countries’ educational systems or international requirements.

Government Regulations 73/1991, and three education regulations previously adopted; i.e., Government Regulations No. 27 of 1990, No. 29 of 1990, and No. 56 of 1998 were of less importance to SECID than Government Regulation No. 60 of Year 1999, not only because the latter pertained to higher education but also because of the former regulations’ remoteness to the transfer of authority to regional-based MONE offices.

Provisions of Government Regulations 27/1990, 29/1990, and 56/1998 permit foreign embassies to establish higher education institutions compatible with their individual countries’ requirements.

4.2.2 Lower-Ranking Implementing Regulations⁸

The Decision of the Minister of Education and Culture⁹ Decree No. 264/U/1999 Regarding “Cooperation of Higher Education Institutions,” and the Decision of the Director General of Higher Education No. 61/DIKTI/Kep/2000 Regarding “Guidelines for the Implementation of Cooperation Between Indonesian Higher Education Institutions and Overseas Higher Education, or Other, Institutions,”¹⁰ were issued to implement the Government Regulation No. 60 of Year 1999.

5 Application of the Legal Framework to SECID’s Objectives

For the purpose of analyzing the legal and regulatory framework governing foreign providers of educational services such as SECID, it is critically important to note that neither Government Regulation No. 60/1999 nor the two regulations adopted to implement it were based on, nor refer to, Indonesia’s two key decentralization laws issued the month prior to their adoption: i.e., Laws No. 22 of Year 1999 on Regional Government Administration and Law No. 25 of Year 1999 on the Fiscal Balance between the Central and Regional Governments, most likely because the laws were being drafted separate and apart from the drafting of the lower-ranking regulations.

Although both decentralization laws were enacted in May 1999, they only became effective on 1 January 2001, and Indonesia’s district governments (*kota* and *kabupaten*)

⁸ A hierarchy of Indonesian laws and regulations is provided in Annex C.

⁹ Later in 1999, the title was changed to the Minister of National Education.

¹⁰ Unofficial English language translations were provided to the Consultant with the TOR.

are now permitted to function autonomously; except for defense and security, foreign policy, monetary and fiscal policies, judicial affairs, and religious affairs; and participate in revenue sharing from certain taxes and revenues.

Members of the Local Parliament (*Dewan Perwakilan Rakyat Daerah* or DPR-D) will elect the district executive, the *bupati* or *walikota*. Together, the legislature and district executive will be responsible for considering a wide range of political, economic and social development policies and development activities appropriate for their region.

Decentralization and good governance have the potential to increase significantly the responsiveness and accountability of government officials, a major benefit of moving the government closer to the people. Beneficial changes would be realized because locally elected officials generally know their constituents' needs better than central government officials and are therefore in a better position to provide the public services their citizens want and need. Additionally, physical proximity would make it easier for citizens to hold local government officials accountable for their performance.

Particularly in the education sector, accountability would appear to have the potential to help ensure that education projects being carried out by the newly empowered local governments would be supported by their citizens and have the optimum chance to achieve their development objectives, a significant problem SECID experienced on the Sriwijaya Development Project.

It is important to note the relationship of the government education regulations to Indonesia's decentralization laws because Indonesia's substantive legal system is hierarchical based on its Constitution, and¹¹ the decentralization laws take precedence over lower ranking laws¹² and regulations.

Considering the legal framework, SECID determined that it was permitted to:

- A. establish and operate an educational institution in Indonesia;
- B. operate distance learning facilities in the United States which would offer educational services to Indonesians residing within the Republic; and
- C. encourage and facilitate Indonesian students to study at member universities in the United States.

Although the legal and regulatory requirements were neither onerous nor too costly for the consortium to comply, SECID decided to postpone marketing its educational services in these three areas due to Indonesia's dire economic circumstances (lessening the demand for its services) and difficulties it perceived carrying out any of these three objectives in a decentralized Indonesia (lessening the profitability of its services).

¹¹ Annex C provides a discussion of the hierarchical relationships.

¹² The second amendment of Indonesia's 1945 Constitution enshrines decentralization of powers to the regions, stating that powers not specifically granted to the central government by law belong to the regions: Article 18(5) UUD45 as amended.

That Indonesia's dire economic circumstances would lessen the demand for SECID's services is obvious, but the lessening of profitability for its services due to decentralization was far less obvious, and only realized by SECID as it decided to forego opportunities dealing with the general public and, instead, compete for multilateral agency-financed technical assistance projects, the fourth alternative.

6 Multilateral Agency-Financed Technical Assistance Projects

In February 2000, MONE formally requested¹³ Expressions of Interest (EOIs) from Indonesian and foreign consulting firms interested to compete for TA assignments under four World Bank-financed projects; i.e., Basic Education in Bengkulu, Sulawesi, West Java and Riau (cumulatively, \$150 million, including both construction of school facilities and technical assistance).

In accordance with its Business Development Plan, SECID associated with a capable Indonesian consulting firm and, in March 2000, submitted fully compliant EOIs¹⁴ to express its interest to compete for the advertised project.

Subsequently, SECID responded to similar requests from MONE for EOIs and, with its associated firm, submitted compliant responses to compete for contracts under the ADB-financed Technological and Professional Skills Development and Decentralized Basic Education Projects,¹⁵ as well as a subsequently approved World Bank supplemental Basic Education Project to be carried out in areas other than Sumatera, Sulawesi, Eastern Indonesia and West Java.

Interestingly, MONE has more employees and is responsible for more TA projects than any other GOI agency. Over half of Indonesia's four million civil servants are MONE employees, and MONE is responsible for implementing more than three hundred and forty education-development projects entailing approximately one thousand sub-projects. Of these development projects, more than one hundred and fifty, entailing more than five hundred sub-projects, are financed in whole or part by multilateral financing agencies.

MONE Project Managers, Treasurers, and Procurement Committee Members are assigned procurement related tasks in addition to their routine duties. They are rotated, typically annually, and are given basic training to carryout projects in accordance with the requirements of Presidential Decree No. 16 of Year 1994, as supplemented by Presidential Decrees No. 17 and 18 of Year 2000. In those instances where the Presidential Decree No. 16's provisions conflict with the provisions of the lending agency, the conflict is to be resolved the by carrying out the procurement using those provisions of Presidential Decree No. 16 that are not in conflict together with the provisions of the loan agreement. Accordingly, GOI procurement personnel must not only be familiar with Indonesian procurement regulations but also the requirements of

¹³ Through advertisements placed in the Jakarta Post and other widely circulated English language newspapers and magazines.

¹⁴ Each EOI detailed the capabilities of the associated firms, their organizational structure and staffing, as well as their technical, managerial and financial capabilities to carryout the project.

¹⁵ SECID and its associated firm also applied for advertised grants under the USAID "Partnerships for Economic Growth" (PEG) project.

multilateral financing agencies and bilateral donors.

In summary, MONE is, or should be, fully capable of efficiently evaluating the capabilities of educational institutions responding to their requests and developing a “short list” of approximately five firms that would be permitted to compete.

Two years after the formal request for EOIs under these projects valued cumulatively at \$600 million, none of the regional based MONE offices have developed an approved shortlist, further impeding the educational needs of Indonesia’s more than two hundred million citizens.

Why were these important education development projects not carried out efficiently and effectively and, in fact, why have the regional-based MONE offices not made any significant progress to, as a minimum, determine which educational institutions submitting EOIs were qualified to compete?

7 Impact of Decentralization and Good Governance

Is Indonesia’s formal legal system a constraint to foreign providers of educational services, or are there other constraints being encountered?

Difficulties associated with implementing Indonesia’s decentralization and good governance initiatives appear to be the primary constraint to either foreign or domestic providers of educational services.

- Would the newly autonomous local governments carryout projects more efficiently and effectively or would the difficulties the central government experienced in the past also be “decentralized?”
- Would the local governments be more responsive and accountable to their citizens in implementing important development projects, or would indications of corruption not be vigorously pursued and prosecuted?
- Would legal and regulatory restrictions be imposed on foreign education providers endeavoring to take advantage of technological breakthroughs, such as the internet, and therefore further help Indonesians to obtain a quality education at an affordable cost?
- Would the local governments abide by the maximum tariffs established by the central government or would they develop impermissible means to impose addition levies on foreign providers?

Indonesia’s legal system includes the substantive body of laws, policies, and procedures; and the administrative process by which the laws, policies and procedures are implemented. The administrative process is, perhaps, less understood than the

substantive body of law, but of no less importance to educational institutions such as SECID that is attempting to market its expertise to Indonesia.

SECID's assessment of the ideal scenario and possible negative implication to project implementation are provided in Annex D.

8 Supplemental Business Initiatives

Throughout 2000 and 2001, SECID's Executive Director and representatives of its associated Indonesian firm continued to communicate frequently; by telephone, facsimile and email, with MONE officials based in Bengkulu, Sulawesi, West Java, Riau and Jakarta. The purpose of this frequent communication was to more fully convey to the regional based MONE officials the capabilities of SECID and its associated firm so that they would be shortlisted (prequalified) to compete for multilateral agency-financed projects.

To further their business initiatives, SECID's Executive Director traveled to Indonesia each quarter and, together with the President Director of SECID's associated firm, traveled to MONE office in Jakarta, Bengkulu and West Java.

On two occasions, SECID organized events for regional based MONE officials to travel to Jakarta to discuss, in Bahasa Indonesia, the EOI materials originally submitted in English.

Based on its positive assessment of business opportunities for its technical assistance services (even before the shortlist was disseminated and preparatory to opening an Indonesian-based educational institution and/or offering distance learning), SECID proceeded to establish a Representative Office, purchase equipment and hire staff.

9 Non-Legal Implementation Constraints

Over the ensuing two years (February 2000 to February 2002):

- Regional-based MONE officials failed to complete the prequalification stage of the competitive process, the first step required to implement a large number of important education development projects. Their lack of familiarity with the procedural requirements of multilateral agency-financed projects was cited as the primary reason they were unable to complete this first task;
- Regional-based MONE officials worked together cooperatively with representatives of the World Bank, the ADB and MONE officials in Jakarta to "restructure and simplify" the Basic Education projects. This initiative was intended to remove an implementation constraint, however, the regional-based MONE offices again failed to complete the prequalification process within the time allotted;
- Jakarta-based MONE officials "invited" SECID and its associated Indonesian firm to organize and conduct a series of Project Implementation Advisory Services workshops, to be held in Bengkulu and Ujung Pandang, to expedite the shortlisting process. MONE requested two hundred and fifty million rupiah to

authorize the workshop;

- When SECID declined the invitation, Jakarta-based MONE officials requested a lesser amount of financial resources for central government MONE officials to help the regional-based officials to complete the process; and
- When SECID declined this request, MONE officials based in Bengkulu and Ujung Pandang sent informal communications to SECID's associated firm indicating that they would view the consortium more favorably if there was a closer, more cooperative relationship. The communication was interpreted to be a solicitation and was ignored.

10 CONCLUSION

This report has presented the experiences of SECID, a non-profit consortium of twenty United States based universities operating in the Republic of Indonesia during the period February 2000 through February 2002, to analyze the legal and regulatory framework governing foreign providers of educational services in Indonesia.

This report reaches the conclusion that, first, neither the laws and regulations applicable to (a) the consortium's establishment and operation of an educational institution in Indonesia or distance learning facilities in the United States offered to Indonesians residing within the Republic; or (b) the consortium's recruitment of Indonesian students to study at its member universities in the United States were disproportionate to their development objectives. From its experience establishing and operating similar businesses in Haiti, Senegal, Vietnam and the People's Republic of China, the consortium did not feel Indonesia's legal and regulatory requirements, although modestly discriminatory against foreign entities, were overly burdensome. Moreover, the consortium was free to compete for technical assistance-related projects financed by multilateral agencies such as the World Bank and ADB.

Second, constraints encountered by foreign providers of educational services that did affect the viability of their businesses did not stem from the formal legal system (the laws and regulations above), but rather the manner in which the formal legal system was implemented in practice. Unfortunately, the difficulties the central government has experienced implementing important development projects has been "decentralized to the newly-autonomous district governments.

ANNEX A

11 Persons Interviewed for this Assignment

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ANNEX B

12 Education Projects Approved for Implementation

Basic Education (\$300 million in total)

Each of the Basic Education Projects (financed by International Development Associate Credit no. 3189 IND and International Bank for Reconstruction Development Loan No. 4468 IND) was comprised of two separately-competed “packages;” Package A for the construction of physical infrastructure (school buildings and related developments, for which SECID was not interested to compete) and Package B for institutional development, project management, financial management and teacher training.

During February of 2000, the regional-based MONE offices advertised Package B of each Basic Education Project, and requested Expressions of Interest (EOIs) from those firms interested to compete for technical services including capacity analysis and development, teacher training, and assisting the provincial training units to develop training appropriate instruction materials

Technological & Professional Skills Development Project

The overall objective of the Project is to improve the country's international competitiveness and help achieve sustainable economic growth to contribute to poverty reduction, on a gender, social and geographically equitable basis. The Project comprises of two interrelated parts: (a) strengthening the governance and management capacity of the public and private higher education system, improving student equity, supporting retooling program; and Project implementation; and (b) strengthening existing study programs and supporting new study programs in the priority disciplines in higher education, upgrading women study centers and strengthening community and industrial relations.]

Decentralized Basic Education Projects

The Project aims to (i) support Indonesia's policy of enhanced regional autonomy, and (ii) improve the quality and equity of basic education services for the poor. More specifically, the objectives of the project are to (i) support MONE role redefinition, reorganization and capacity building to enable to provide effective policies, guidelines, and training for a decentralized education system; (ii) support provincial education office redefinition, reorganization, and capacity building, (iii) strengthen district capacity to plan, budget, manage, and monitor basic education programs, (iv) improve school-based management and budgeting capacity, (v) enhance the role of the community in school management and decision making; (vi) enhance the availability and effectiveness of local basic education programs for the poor (in particular those related to improving retention in primary and junior secondary schools, transition from primary to junior secondary school); and (vii) improve Education Sector Policy Reform e the quality of education available to the poor by ensuring more equitable allocation of resources for schools in poor areas.

Technical Assistance Grants for Education Sector Policy Reform

The TA will provide a cluster of related support to facilitate ongoing changes in administration/management structure and system of education within the context of fiscal and administrative decentralization being effected in Indonesia. The TA cluster will have multiple number of components, that will be implemented either in parallel or phased, to be implemented over a period of 3 to 5 years. Subject to further discussion with the Government, the TA components are likely to cover (i) initial restructuring/transition management of the central Ministry of National Education (MONE), (ii) capacity building of the new MONE on the new functions and responsibilities, especially on quality control functions, (iii) transition management of the district education offices, (iv) capacity building of the district education units, and (v) essential education policy development.

ANNEX C

13 Hierarchy of Indonesian Laws and Regulations

As with most nations, Indonesia's substantive legal system is hierarchical based on its Constitution and implementing laws and regulations. The Indonesian legal framework is comprised of the following, in order of precedence:

- **Constitution** (*Undang-undang Dasar* 1945): At the top of the hierarchy is the 1945 Constitution which may be implemented in one of three ways: by a decree of the People's Consultative Assembly (*Ketetapan MPR*), by laws (*Undang-undang*) or by Presidential Decision (*Keputusan Presiden*).
- **Decrees of the People's Consultative Assembly** (*Ketetapan Majelis Pemusyawaratan Rakyat* or MPR): MPR decrees fix the broad outlines of national policy for the legislative and executive spheres of government. Laws are required to be enacted to implement MPR decrees directed at the legislature, those at the executive level by Presidential Decision.
- **Laws** (*Undang-undang* or *UU*): Laws are drafted as bills by the People's Legislative Assembly (*Dewan Perwakilan Rakyat* or DPR) and become law if and when ratified by the President. They are passed for the purpose of implementing either the Constitution or a decree of the People's Assembly.
- **Government Regulation** (*Peraturan Pemerintah* or *PP*): Government Regulations are promulgated by the DPR and signed by the President for the purpose of implementing a law.
- **Presidential Decision** (*Keputusan Presiden* or *Keppres*): Presidential Decisions are promulgated by the President to implement the Constitution, to implement a Decision of the People's Assembly in the executive sphere, or to implement a Government Regulation.
- **Presidential Instruction** (*Instruksi Presiden* or *Inpres*): Presidential Instructions are directives from the President or a means to provide a budget for special projects.
- **Other Government Regulations**: For the purpose of implementing a higher-ranking regulation, other lower-ranking regulations may be issued.

ANNEX D

14 Implications on Project Implementation

SECID carefully considered the implications of decentralization and good governance, particularly as it relates to project implementation.

Each district government will be comprised of a legislative branch (DPR-D) and an executive branch (*bupati* or *walikota*) of government. The judiciary will continue to report to the central government. District citizens will elect the DPR-D legislators, who will then elect the district executive.

SECID perceived that under an ideal scenario:

- the DPR-D legislators and the district executive would work together cooperatively to consider and decide, in a transparent and fair manner, a wide range of political, economic and social development policies most appropriate to benefit their citizens, with a strong, independent judiciary enforcing the rule of law;
- the district governments would exercise their authority and strengthen their project management and government procurement organizations, which would then recommend appropriate policies, as well as effectively monitor and manage education development projects in their regions;
- the district governments would develop structural, non-rotational positions for professional government project management and procurement officials to staff the project management and government procurement organizations. These officials will be well trained to ensure that identified objectives are achieved in a timely, cost efficient manner, without regard to personal interests or political influence;
- competition, transparency and fairness would then be the cornerstones of the district governments' fully developed, well-functioning procurement systems. Government procurement laws and regulations would be clear and consistent; accessible to the public and private sectors; predictable in their interpretation of procurement policies into procedures and practices; and, to the extent practical, compatible with good commercial practice and the procurement requirements of international lending institutions;
- accountability at the district level would minimize corruption, collusion and nepotism. Clean Governance Law No. 28 of Year 1999 and Anticorruption Law No. 31 of Year 1999 will be fully implemented and enforced. Indications of corruption will be vigorously pursued and prosecuted;
- project Management and government procurement officials will, routinely, be given implementation training to carry out newly-adopted government procurement regulations;

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- the private sector would respond affirmatively to the district governments' development of a clear framework of rules to govern procurement transactions. Increased economic activity will further develop the region's human resources and facilitate the growth and development of small and medium scale enterprises;
 - the district governments would develop administrative forums to fairly and impartially arbitrate disputes arising from government procurement bid protests and performance disputes;
 - the judicial branch of government would enforce the rule of law, in a consistent and transparent manner, an essential good governance principle. Court decisions, including those pertaining to government projects and procurements, will be published and available to the public;
 - the districts' fiscal needs would be openly debated. With inputs from its citizenry and non-governmental organizations, the DPR-D may democratically decide whether or not, and how, to increase district revenues to further develop their *kabupaten* or *kota*;
 - when the districts' fiscal resources are insufficient, alternative means will be considered to fulfill important public needs. When appropriate, the private sector may be invited to participate in the financing, construction and operation of infrastructure and related services. Public private partnerships will be conducted by the regions in a competitive, transparent and fair manner; and
 - citizens will have full access to information concerning the functioning of their district governments, and provided the opportunity to elect responsive government officials to influence its decisions. Stability will provide the foundation to help Indonesia resume its rapid rate of economic growth.

SECID was particularly troubled with the potential for the newly autonomous district governments to function improperly, and for the difficulties the consortium had experienced under the Sriwijaya Project to be perpetuated. If either or both the DPR-D or the district executive do not function as envisioned, and there are only weak traditions of a participatory development process at the district levels of government, then important government development projects may not be planned or carried out in an efficient and effective manner, and public needs may go unfulfilled.

SECID perceived that a DPR-D member, a select group of DPR-D members or a political party could dominate the political process for their self interests, to the detriment of education development projects within their districts, and that it could prove difficult to minimize the corrosive effects of corruption, collusion and nepotism or to facilitate the work of the commissions established under Clean Governance Law No. 28 of Year 1999 and Anticorruption Law No. 31 of Year 1999.

If decentralization and good governance were not carried out as planned, a number of negative implications could occur:

- Although district governments must apply Indonesia's newly adopted Presidential Decrees No. 17 and 18 of Year 2000 to all procurements financed in whole or part by the central government, they are free to decide how to procure goods and services financed from district revenues. The promulgation of district government procurement regulations may result in a plethora of local, unique procurement rules and practices, perhaps designed to benefit local contractors, suppliers and consultants at the expense of national development;
- Enforcement of the district governments' compliance with the new procurement decree will occur almost exclusively from post-award audits, conducted primarily by BPKP, perhaps years after the project is completed;
- The sheer number of district governments (approximately 54 *kota* and 384 *kabupaten*), may inhibit the development of a cohesive, well-functioning government procurement system;
- District governments may lack the resources or resolve to develop the capability to formulate government procurement policy and, in concert with the central government, to effectively monitor and manage government procurement activity;
- An absence of a definitive and complete set of rules governing the procurement process at the district level of government may impede the competitive-selection process and afford politically-connected businesses the opportunity to receive preferential treatment in the award of contracts outside the established procurement process;
- Newly enacted government procurement laws and newly adopted government procurement regulations will be disseminated on an ad hoc basis. District governments will not routinely provide implementation training to assigned government procurement officials;
- District governments may decide to continue the periodic rotation of assigned project and procurement management personnel, primarily less-senior Echelon III officials, and be unable to develop a stable cadre of well-trained government officials to ensure that identified objectives are achieved in a timely, cost efficient manner;
- Government procurement bid protests and contract performance disputes may continue to be addressed informally, without the assistance of an administrative forum to fairly and impartially arbitrate such matters;
- Court decisions, including those pertaining to government procurements, may, for a variety of reason, be decided on an ad hoc basis and not be published nor made available to the public;

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- Infrastructure and related services to be financed in whole or part with private sector investment may be routinely awarded on a non-competitive basis, with end users paying an above market-value tariff and the citizens of the district governments bearing all contingent liabilities; and
 - Citizens will not have access to information concerning the functioning of their district governments. Because they are not fully informed, they will be unable to make meaningful decisions to influence the DPR-D or district executive. Social unrest may occur, which would hinder Indonesia's resumption of economic growth.

The above depicts two widely varying scenarios. As indicated by the public debate concerning a wide array of regional autonomy matters, the Government does not yet appear to have formed the prerequisite national consensus concerning how Indonesia's decentralization laws will be implemented. Since the process is proceeding during a wide-ranging national debate, there is a danger that, unless the consensus is formed, important development projects may be politicized, to the detriment of good donor-government relations, and the disadvantage of stakeholders.